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In the Matter of M (Children): A Collision between Two Unconnecting Worlds?

The recent judgment of the Court of Appeal, *In the Matter of M (Children)* (hereinafter '*Re M*') [2017] EWCA Civ 2164, considered an application by a legal father for direct contact with *her** five minor children. Sitting at first instance (*J v B and the Children (Ultra-Orthodox Judaism: Transgender)* [2017] EWFC 4), Peter Jackson J (as he then was) had refused contact on the basis that a face-to-face relationship would expose the children and their mother to social marginalisation in their religiously conservative community. The Court of Appeal (Mumby P, Arden LJ and Singh LJ) allowed the father's appeal and remitted the case for further consideration before Hayden J. The litigation – which has been a source of intense media and academic debate (Wilson, 2017; Edwards, 2018; Sherwood, 2017) – touches upon highly sensitive issues, requiring family judges to assess the appropriate role of human rights in welfare determinations.

The dispute in *Re M* centres on the ultra-orthodox Charedi Jewish community in North Manchester. The father, who self-identifies within the Charedi Jewish faith, is a transgender (trans) woman. She entered into an arranged marriage in 2001, and the couple had five children. In 2015, the father left the family home in order to undertake a process of gender transition. She now lives in, and externally presents, her preferred female gender. As a result of manifesting a trans identity, the father has been excluded from the Charedi community in Manchester and is denied access to her children.

In January 2016, the father made the application for direct contact. This was strongly opposed by the mother who argued that, within the religion-focused structures of Charedi Jewish society, imposing a face-to-face relationship would give rise to isolation, ostracism and a possible requirement that the children leave their community (*J v B*, paras. 73-74). These fears were reinforced by numerous experts during the application hearing, including a rabbi, representatives from the Anna Freud Centre and the children's guardian (*Re M*, paras. 16-28).

In his judgment, Peter Jackson J identified fifteen "formidable" arguments in favour of direct contact (para. 166), including respect for the wishes of the children and upholding the right to family life (para. 166). Nevertheless, the judge ultimately decided to refuse direct contact (preferring indirect contact four times a year, para. 188) because "the likelihood of the children and their mother being marginalised or excluded by the ultra-Orthodox community [was] so real, and the consequences so great, that this one factor, despite its many disadvantages, must prevail over the many advantages of contact" (para. 187).

The Court of Appeal remitted the case for further consideration, identifying a number of problems with Peter Jackson J's reasoning. First, the Lords Justices were not satisfied that – having determined that the possibility of transphobic discrimination could militate against direct contact – the judge

sufficiently considered whether such a conclusion was consistent with his role as “the judicial reasonable parent applying the standards of reasonable men and women today” (para. 77). These latter individuals are, according to the Court, “receptive to change, broadminded, tolerant, easy-going and slow to condemn” (para. 60). They would be unlikely to accept that mere social animus – without greater justification – could suffice to terminate all direct contact between parent and child.

Second, the Lords Justices were also concerned that Peter Jackson J had given up too easily in his attempts to enforce direct contact (para. 80). On this point, there were two particularly influential considerations. First, in his judgment, Peter Jackson J had made a specific issue order directing that “staged narratives” be prepared so that the five children could gradually be re-introduced to their father. For the Court of Appeal, it was premature to definitively refuse direct contact before this important work had been completed and before its effects on the children were fully known (para. 80). In addition, having regard to evidence that the North Manchester community would tolerate *indirect* contact, the Lords Justices were not convinced that – if the proper ultimatums were applied (including threats to remove the children into care) – the community could not be persuaded to accept direct contact arrangements (paras. 77 and 80).

Finally, the Court of Appeal noted that, although issues of human rights had “not much been explored before him”, it was “unfortunate that the judge did not address head on the human rights issues and the issues of discrimination which plainly arose” in the case (para. 78). While it was not clear how any community actor, other than schools which might potentially refuse to accept the children, could violate the Equality Act 2010 (para. 87), there were still important human rights matters to consider. These included whether English family courts should weigh a risk of discrimination as a factor *against* direct contact (para. 97), public authority duties under section 6(1) of the Human Rights Act 1998 (para. 115) and the right of the community to manifest religious beliefs under article 9 of the European Convention on Human Rights (ECHR) (paras. 134 – 135).

As noted, the dispute in *Re M*, both in the High Court and before the Court of Appeal, has divided academic and media commentators.

Approaching the case through a family law lens – with a specific emphasis on the paramountcy of children’s welfare – it is difficult to locate the alleged vulnerabilities in Peter Jackson J’s reasoning. In his lengthy decision, the judge undertook an extensive analysis of the relevant facts. He drew from expert sources, consulted the children’s guardian and even gave due weight to views expressed by the family’s eldest son. That individual, while undoubtedly affected by concern for his mother and siblings, manifested a clear desire against direct contact (*J v B*, paras. 137 – 142). The judge engaged in a careful review of all relevant factors, concluding that – at this stage in their development – the children’s welfare

was best served through continued integration within their close-knit religious community (*J v B*, paras. 182 – 189). Where such integration necessitated withholding direct contact, Peter Jackson J was reasonably entitled to enforce that result.

Without doubt, from a wider social perspective, terminating face-to-face relationships to prevent potential discrimination is a sub-optimal outcome. In an ideal scenario, judges would challenge (rather than tacitly acquiesce in) discriminatory intra-community norms. However, the test set out in s. 1 of the Children Act 1989 (CA) is clearly rooted in welfare rather than social desirability. Section 1 CA does not permit family courts to sacrifice individual child welfare in the pursuit of social progression. To the extent that the Court of Appeal places equal (if not more) emphasis on the wider social implications of refusing direct contact, it is arguable that it was the Lords Justices, rather than Peter Jackson J, who “ultimately lost sight of the paramountcy principle” (*Re M*, para. 40)

On the other hand, however, approaching the case through a human rights lens, there is undoubtedly much to applaud in the appeal judges’ reasoning. First, and perhaps most importantly, *Re M* is a powerful statement that discriminatory actors should not benefit from their own reprehensible conduct. A strong critique of Peter Jackson J’s opinion is its implicit encouragement of the community’s victimisation of the children. Where family courts refuse direct contact because of potential discrimination, this incentivises, rather than discourages, actors to persist in that discriminatory behaviour (*Re M*, para. 63).

Second, the Court of Appeal offers a welcome acknowledgement that, while human rights cannot displace the paramountcy of welfare, they are a relevant factor in determining children’s best interests. In the specific context of *Re M*, one would have to adopt a highly myopic understanding of welfare to focus solely on potential community reactions, without considering the wider implications of what it means to deprive children of direct contact because of discrimination. There are legitimate doubts that, for the five children affected by this litigation, their welfare could be adequately promoted through legitimising transphobia-inspired community norms.

Finally, the dispute in *Re M* must be understood within a broader historical context whereby trans parenting rights have been, and continue to be, significantly limited throughout Europe. In 2018, twenty jurisdictions across the Council of Europe continue to impose sterilisation as a pre-condition for legal gender recognition (Dunne, 2017). Expressing a trans identity has often been cited as a sufficient justification to remove various parental rights (see generally, Scherpe, 2015). There is a baseline assumption, driven by transphobic prejudice, that gender diverse individuals offer an inferior framework in which to raise children. While the dispute in *Re M* does not raise the argument that, as a trans woman, the father should automatically be refused direct contact, Peter Jackson J’s judgment

would create a similar result. Although the community's discriminatory attitudes are not invoked to undermine the father's parenting capacities, they are ultimately determinative of whether the father enjoys a face-to-face relationship with her children. As noted above, the Court of Appeal does insufficiently recognise the centrality of welfare in contact disagreements. However, *Re M* is a welcome affirmation that – where such disagreements come before family courts – trans individuals must enjoy basic human rights and equality guarantees.

** The father in this case is a transgender woman and prefers female pronouns*

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